Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

IN RE: MICHAEL F. GREEN,
Petitioner,

v.

HARRY K. SINGLETARY, JR.,
as Secretary, Department of Corrections,
State of Florida,
Respondent.

Original Proceedings

PETITION FOR WRIT OF HABEAS CORPUS

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the legal standard for issuance of a certificate of appealability under 28 U.S.C. §2253(c)(2) after the Antiterrorism Effective Death Penalty Act amendments is the same as the standard for issuance of a certificate of probable cause under preexisting law?

2. Whether the prosecution of a 13 year old sexual battery allegation against Petitioner Green was constitutionally "overly stale" under the Due Process Clause?

B. CUSTODY

The Petitioner is in custody in violation of the Constitution of the United States in the Department of Corrections of the State of Florida, at the Avon Park Correctional Institution, Avon Park, Florida.

C. REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH PETITIONER IS HELD.

The Petitioner filed a petition under 28 U.S.C. §2254, which was denied by Order Upon Magistrate's Report and Recommendation by United States District Court Judge James C. Paine on 17 July 1997. (A-1-7). The District Court Judge denied Petitioner's Motion for Certificate of Appealability pursuant to 28 U.S.C. §2253 on 20 August 1997. (A-8-9). Notice of appeal was filed on 15 August 1997, and Motion for Issuance of Certificate of Appealability was filed in the Eleventh Circuit Court of Appeals on 13 October 1997. The

motion for certificate of appealability was denied by the United States Circuit Judge Joel F. Dubina on 07 January 1998. (A-10).

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The parties are identified in the style of the case.

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G. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order denying certificate of appealability on 07 January 1998. No Petition for Rehearing was filed in the Court of Appeals. The jurisdiction of the Supreme Court of United States is invoked pursuant to 28 U.S.C. §2241.

Petitioner asserted below, and asserts here, the deprivation of rights secured to him by the Constitution of the United States. Jurisdiction of this Court derives from 28 U.S.C. §§2241 and 2242. *See Felker v. Turpin*, ---U.S.---, 116 S.Ct. 2333 (1996).

H. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the proper legal standard under 28 U.S.C. §2253(c)(2) to be met in applying for a certificate of appealability from proceedings under 28 U.S.C. §2254. 28 U.S.C. §2253(c)(2) provides:

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

2. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution are implicated on the unlimited statute of limitations which in this case denied Petitioner his right to a speedy trial, to wit:

> Article V. No person shall be held to answer for a capital or other infamous crime...without due process of law.
>
> Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy trial....
>
> Article XIV. ...[N]or shall any State deprive any person of life, liberty or property, without due process of law....

I. STATEMENT OF THE CASE

1. The Basis for Jurisdiction Below.

Jurisdiction of the United States District Court, Southern District of Florida, was invoked by a person in state custody pursuant to 28 U.S.C. §2254. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked through 28 U.S.C. §1291.

2. Facts Pertinent to the Questions Presented and Course of Proceedings.

a. State Court Proceedings.

On 27 March 1990, the Petitioner, Michael Franklin Green, was arrested at Port St. Lucie High School where he worked as a physical education teacher and girls' varsity softball coach, (R 611, 1268). The charges were sexual battery which allegedly occurred thirteen years earlier in 1977. The sole alleged victim in each count of the information was one Betty Drawdy, who was 24 years old at the time of the arrest. The time frame for the two counts was the same, between 01 March 1977 and 25 December 1977, in St. Lucie County, Florida.

The case went to trial, Circuit Judge Marc A. Cianca presiding. The trial began on 05 November 1990, with jury selection, and concluded on 11 November 1990, with a verdict of guilty of sexual battery as charged on both counts. (R 1625). On 11 January 1991, Mr. Green was adjudicated guilty of the two counts of sexual battery, §794. 011(2), Fla. Stat., (R 1688), and sentenced to a term of imprisonment for his natural life with a twenty-five year mandatory minimum. (R 1690). The sentences were to run concurrent. (R 1693). On 11 January 1991, Mr. Green filed a notice of appeal. (R 1694).

The issues raised on direct appeal principally involved the improper use of similar fact evidence under the *Williams* rule[1] at Mr. Green's trial. Also raised on appeal by Mr. Green was the assertion that the trial court allowed the state to exercise peremptory challenges against black jury venire members

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[1] *Williams v. State*, 110 So.2d 654 (Fla. 1959), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); codified in Florida Evidence Code, Fla. Stat. §90.404(b).

without sufficiently evaluating the prosecutor's pretextual rebuttal to the defendant's timely objections. (A 36). The Fourth District Court of Appeals affirmed, per curiam, without written opinion Mr. Green's convictions and sentence. *Green v. State*, 559 So.2d 639 (Fla. 4th DCA 1992).

On 15 July 1993, Mr. Green filed a *pro se* motion for post-conviction relief, pursuant to Rule 3.850, Fla.R.Crim.P., identifying a number of acts or omissions constituting ineffective assistance of trial counsel. The trial court, Judge Cynthia Angelos, conducted an evidentiary hearing on Mr. Green's *pro se* motion on 18 May 1994. On 08 June 1994, Judge Angelos entered an order denying Mr. Green's motion for post-conviction relief. (0A 414).[2] A notice of appeal from that order was filed on 08 July 1994, and on 28 August 1995, the Fourth District Court of Appeals affirmed the trial court's denial of Mr. Green's post conviction relief motion without written opinion. *Green v. State*, 659 So.2d 283 (Fla. 4th DCA 1995).

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[2] Reference to original appendix.

b. Federal Court Proceedings and Exhaustion of Claims.

On 28 August 1996, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. §2254 in the United States District Court, Southern District of Florida. The Petition raised the following four grounds for relief: (1) that he was denied the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution by the application of an unlimited statute of limitations by the State of Florida; (2) that the denial of a statute of limitations prevented trial counsel from rendering effective assistance; (3) that he was denied the effective assistance of counsel because his trial counsel failed to conduct an adequate investigation, failed to subpoena key witnesses, and failed to object to prejudicial testimony; and (4) that his jury was unconstitutionally selected and empaneled in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Petitioner's due process/statute of limitations and ineffective assistance of

counsel claims were raised and argued before the Circuit Court in his Motion for Post-Conviction Relief. The *Batson* claim was raised at trial by way of an objection and on direct appeal.

In response to petition for writ of habeas corpus, the state moved to dismiss the petition on grounds that Petitioner had not exhausted his state court remedies. The Report and Recommendation by the United States Magistrate filed on 02 April 1997, recommended the District Court to deny the Petition for Writ of Habeas Corpus because of lack of timeliness under the AEDPA and to grant the state's motion to dismiss. On 17 July 1997, the United States District Court reversed the magistrate's holding that the Antiterrorism Effective Death Penalty Act should be applied to the petition, and reversed in part, but Judge James C. Paine on reaching the merits, denied the petition. (A-1-7).

A motion for certificate of appealability pursuant to 28 U.S.C. §2253(c)(2) was then filed, briefed, and followed by the filing of the notice of appeal on 13 August 1997. On 20 August

1997, the United States District Court denied Petitioner's motion for certificate of appealability. (A-8-9). Petitioner proceeded to move and brief the Eleventh Circuit Court of Appeals for a certificate of appealability, which was denied by the Eleventh Circuit on 07 January 1998. (A-10). This action ensues.

J. REASONS FOR GRANTING THE WRIT

1. It was submitted that Mr. Green made a "substantial showing of the denial of a constitutional right" in his habeas corpus petition. 28 U.S.C. §2253(c)(2).

Some difference of opinion exists as to whether §2253(c)(2), which provides that a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right," modified preexisting law. The preexisting law defined the required showing as "a substantial showing of the denial of [a] federal right." The Fifth Circuit Court of Appeals in *Drinkard v. Johnson,* 97 F.3d 751 (5th Cir. 1996) has held that in §2254

proceedings, the standard for issuance of a certificate of appealability (COA) after the AEDPA amendments is the same as the standard for issuance of a certificate of probable cause (CPC) to appeal under preexisting law. The Second Circuit Court of Appeals, in *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996) reached the same conclusion. The Second Circuit, citing *Herrera v. Collins*, 506 U.S. 390 (1993), reasoned that "a COA is available only with respect to a 'constitutional' right, whereas a CPC was stated to be available with respect to a 'federal right' is, in the context of a habeas petition under section 2254, a distinction without a difference since the writ may issue upon the petition of a state prisoner *only for denial of a constitutional right*." *Id.*, at 680 (emphasis added). The Tenth Circuit Court of Appeals, in *Lennox v. Evans,* 87 F.3d 431 (10th Cir. 1996) reached the same conclusion as the Fifth and Second Circuit Courts of Appeals.

The Ninth Circuit Court of Appeals, in *Williams v.*

Calderon, 83 F.3d 281 (9th Cir. 1996) reached a different conclusion stating, without discussion, that the standard for obtaining a certificate of appealability under the AEDPA amendments is "more demanding" than the *Barefoot* standard for certificate of probable cause to appeal. The Eleventh Circuit Court of Appeals has not directly ruled on the issue, but in *Hunter v. United States,* 101 F.3d 1565 (11th Cir. 1996), the court assumed "for present purposes that the amendments have raised the hurdle for obtaining the certificate that is a prerequisite to an appeal from the denial of relief." *Id.*, at 1571.

There is, however, case law that has addressed what constituted "a substantial showing of the denial of a federal right" which was needed to obtain a certificate of probable cause for appeal. In addition to the definition of the standard set out by the United States Supreme Court in *Barefoot*,[3] other

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[3] *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

precedent has narrowed the definition of what constitutes a substantial showing of the denial of a federal right. The Ninth Circuit Court of Appeals, in *Fouquette v. Bernard,* 198 F.2d 96 (9th Cir. 1952), held that a certificate of probable cause was warranted where the record presented a substantial question concerning local prejudice denying petitioner a fair trial. The Ninth Circuit in *Thomas v. Duffy,* 191 F.2d 360 (9th Cir. 1951) also held that the function of the judge in determining whether there is probable cause for appeal is not to decide the issues contended to have been erroneously decided below, but to determine whether there is "a substantial question" for the court to decide. Because the amendment to 28 U.S.C. §2253 is so new, there is no case law which directly addresses how one can satisfy the new standard.

The substantial question doctrine has been followed by several courts, that is the district court must determine whether the petition presents substantial legal questions worthy of

consideration. *Rogers v. State of Visconsin,* 812 F.Supp. 905 (E.D.Wis. 1993); *Wilks v. Young,* 586 F.Supp. 413 (D.Wis. 1984); *Pizarro v. Harris,* 507 F.Supp. 642 (D.N.Y. 1981); *Siegel v. Follette,* 290 F.Supp. 636 (D.N.Y. 1968).

The issues, facts, and procedural history surrounding Mr. Green's case satisfy the tests set out above. Furthermore, even if the Court decides that the new standard for issuance of a certificate of appealability is a higher one, Mr. Green's case involves a denial of a fundamental constitutional right -- due process -- and satisfies the higher standard.

Mr. Green would also like to call attention to the Court that for purposes of ruling on a petition for certificate of probable cause, the Court should accept material recitals of the petition as true. *In re Mooney,* 72 F.2d 503 (9th Cir. 1934). There is no indication that this presumption has changed for certificates of appealability.

2. Mr. Green was denied due process through the application of the State of Florida's unlimited statute of limitations in capital sexual battery cases under §775.15, Florida Statutes.

Michael Green alleged in his federal habeas petition that he was denied due process of law by the application of §775.15, Florida Statutes, which provides for an unlimited statute of limitations period for all "capital" crimes in Florida. Mr. Green was not challenging the constitutionality of the unlimited statute of limitations per se. The opinion of *Sochor v. Florida*, 580 So.2d 595 (Fla. 1991), relied upon by the district court, merely held that there is an unlimited statute of limitations for capital crimes in Florida, and *Sochor* was a first-degree murder case.

The issues presented in Mr. Green's petition, however, challenged the application of the statute to the facts of his case where there had been an unjustified 13-year delay between the dates of the alleged acts and the disclosure of the allegations to

law enforcement, during which the alleged victim was an adult the last six to seven years. In other words, the question was whether the federal constitution forbade the state from bringing a prosecution such as Mr. Green's, not whether the statute of limitations, as it was enacted, allowed such a prosecution.

The United States Supreme Court has held that the Sixth Amendment does not govern issues of preindictment delay, *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and that the primary guarantee against bringing overly stale charges lies with the statute of limitations. *Id.* at 322, 92 S.Ct. at 464, quoting, *United States v. Ewell*, 383 U.S. 116, 112, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966). But, the Court has also acknowledged that "statute of limitations does not fully define a [defendant's] rights with respect to the events occurring prior to indictment," 404 U.S. at 324, 92 S.Ct. at 465, and that the Due Process Clause has a limited role to play in protecting against oppressive delay. *United States v.*

Lovasco, 431 U.S. 783, 788; 97 S.Ct. 2044, 2048 (1977).

The orders below did not address the jurisprudence involving statutes of limitations in criminal cases that limit exposure to criminal prosecution to a certain fixed period of time following the occurrences of those acts the Legislature has determined to punish by criminal sanctions. *Id.*, at 404 U.S. at 323, 92 S.Ct. at 465. There is a significant difference between a capital death penalty case where a murder is alleged to have occurred, and a "capital" case involving allegations of sexual battery.

In Florida, a first-degree murder charge entitles a defendant to a twelve person jury and a requirement that the charges be preferred through an indictment by a grand jury. These protections were not available to Mr. Green even though he was forced to defend against a charge brought thirteen years after the alleged acts occurred. Mr. Green was not at fault; he caused no delay. There is no allegation of threat or duress

against the alleged victim.

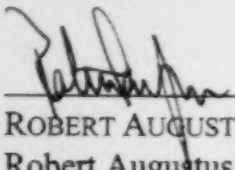
This case is an example of a growing problem in late twentieth century America. The seemingly weekly news accounts of allegations of child sexual abuse in familial or custodial type circumstances. It is the crime of the nineties. It is an allegation of a violation of a child's trust with an adult. In cases like Mr. Green's, the prosecution has been delayed for years through no fault of the defendant. There was no threat, no force, no coercion, no duress on the alleged victim Betty Drawdy. Ms. Drawdy was never incapacitated. She, in fact, continued to play softball for Mr. Green a number of years after the alleged incidents. She knew Mr. Green continued to teach school and coach girls' softball. It is not diminishing in any sense the seriousness of actual child sexual abuse cases for there to be a time limitation on initiating these claims after a child reaches adulthood or a case-by-case assessment of the ramifications of delay. The due process clause of the

Fourteenth Amendment requires it. Mr. Green was effectively denied the right of presenting a defense to overly stale charges by an alleged victim who abused her right to prosecute and by the State of Florida through its application of §775.15, Florida Statutes. Prejudice is presumed. *See Doggett v. United States*, 505 U.S. 647; 112 S.Ct. 2686, 2692; 120 L.Ed.2d 520 (1992).

K. CONCLUSION

The petition for writ of habeas corpus should be granted, or, in the alternative, the Petition being in substantial form and within appropriate time limits may be treated as a petition for writ of certiorari.

Respectfully Submitted,



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APPENDIX TO
PETITION FOR WRIT OF HABEAS CORPUS

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-14227-CIV-PAINE

MICHAEL FRANKLIN GREEN,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent,

_____/

ORDER UPON MAGISTRATE'S
REPORT AND RECOMMENDATION

This matter is before the court upon Magistrate Judge Lynch's Report and Recommendation and upon Petitioner's Objections thereto. Upon review of the applicable authority and de novo review of the record, the court enters the following order rejecting in part and adopting in part Judge Lynch's Report and Recommendation.

Timeliness of Petition

The threshold issue before this court is whether the

newly enacted limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA" or the Act) is effective against a cause of action which had accrued previously, but which was filed following the enactment of the Act. This question is one of first impression.

The Eleventh Circuit has provided some guidance on the issue. In Hunter v. Bailey, 101 F.3d 1565 (11th Cir. 1996), the Court held that the AEDPA's certificate of appealability provisions apply to pending §2254 cases where no application for a certificate of probable cause to appeal was filed before the effective date of the Act. In so holding, the court noted that,

> We do not mean to imply that all of the AEDPA amendments to the collateral review statutes and rules may be applied to pending cases. Section 101 of the AEDPA amends 28 U.S.C. §2244(d) to require that any 28 U.S.C. §2254 application be filed within one year of the completion of the state court direct review process, subject to tolling for the period when a properly filed state collateral review proceeding is pending. The Second Circuit has held that application of that provision to bar a §2254 application filed before the AEDPA's effective date "would be entirely unfair and a severe instance of retroactivity." Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996).... As the Supreme Court instructed us in Landgraf [v. US Film Prods., 511 U.S. 244 (1994)], "courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases."

More recently, the Supreme Court held that the new provisions of the AEDPA do not govern in non-capital habeas

petitions which were pending at the time the Act was passed. Lindh v. Murphy, 65 USLW (June 23, 1997). However, neither the Eleventh Circuit nor the Supreme Court reached the question of applying the limitations period to actions filed after the AEDPA's effective date. Furthermore, although the Second Circuit declined to address the precise issue in Reyes, it later held that a petitioner must be afforded a reasonable time following the passage of the Act before claims which have accrued before the Act's passage will be time barred. Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997). After a careful review of this persuasive authority on the issue, this court agrees with the Second Circuit's holding that where an action accrued prior to the enactment of the AEDPA, the Act's new limitations period can only be applied to bar the action after a reasonable time has elapsed. The Supreme Court has held that a presumption against retroactive legislation should apply, in the absence of clear congressional intent to the contrary, and that this presumption implicates basic notions of justice and fairness deeply rooted in our nation's jurisprudence. Landgraf, 114 S.Ct. at 1497-1501; see also Kaiser Aluminum & Chemical Corp. V. Bonjorno, 494, U.S. 827, 842-44 (1990); General Motors Corp. V. Raiman, 503 U.S. 181 (1992). Section 107(c) of the AEDPA provides that amendments apply to capital cases "pending on or after the date of enactment." However, Congress did not state whether the new limitations period should apply to pending non-capital habeas cases. In the absence of a clear statement from Congress, it would appear the new limitations period applies only prospectively to non-capital cases. Lindh v. Murphy, 65 USLW 4557 (June 23, 1997). Therefore, to apply the limitations bar to an action which had accrued prior to the effective date of the Act would be an impermissible retroactive application. Further, additional Supreme Court jurisprudence has also determined that the Constitution may require that statutes of limitations must "allow

a reasonable time after they take effect for the commencement of suits upon existing causes of action." Block v. North Dakota Bd. Of Educ., 461 U.S. 273 (1983). Accordingly, this court finds that the Petitioner in the present case must be given a reasonable time after the AEDPA became effective before his habeas petition is time-barred.

The next issue, therefore, is what amount of time is reasonable? The Second Circuit in Peterson, refused to accord a full year "extension" in every case, holding that "In circumstances like [petitioner's], where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a "reasonable time" should be applied with undue rigor." In the present case, the judgment against the Petitioner became final, pursuant to 28 U.S.C. §2244, on January 13, 1992, the day the Fourth District Court of Appeal denied the Petitioner's Motion for Rehearing of its order affirming his conviction. Further, because the AEDPA provides that the time during which a properly filed application for collateral review is pending shall not be counted toward the period of limitation, Petitioner's time began to run on July 19, 1995, when denial of his motion for post-conviction relief was affirmed by the Fourth District Court of Appeal. Petitioner filed his habeas petition in this court on September 3, 1996, only four months after the effective date of the AEDPA and less than 14 months after his post-conviction relief was finally denied by the state court. Under these circumstances, the court finds that the present action was filed within a reasonable time after the statute of limitations was amended and after his conviction became final. Accordingly, that part of Judge Lynch's Report and Recommendation that urges dismissal on statute of limitations grounds is rejected and the court will address the Petition on the merits.

Grounds I and II: Statute of Limitations

In grounds I and II of his petition, the Plaintiff claims that he was denied the due process of law and the effective assistance of counsel because Florida has an unlimited statute of limitations in capital sexual battery cases. In Sochor v. Florida, 580 So.2d 595 (Fla. 1991), the Florida Supreme Court held that Florida Statute §775.15(1) provided for an unlimited period of limitations in capital cases. Accordingly, Petitioner's challenge to his capital conviction on statute of limitations grounds is without merit. Likewise, Petitioner's contention set forth in ground II, i.e. that Florida Statute §775.15, which provided for an unlimited statute of limitations in capital cases, prevented defense counsel from subjecting the state's case to a meaningful adversarial testing, is also without merit.

Ground III: Ineffective Assistance of Counsel

To show counsel was constitutionally ineffective, Green must show "that counsel's representation fell below an objective standard of reasonableness" and, additionally, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Under Strickland, counsel's strategic choices are presumed to be adequate. In the present case, the Petitioner has failed to show that the facts of this case warrant the rare finding of ineffective assistance of counsel. Where trial strategy is involved as it is in the Petitioner's claim of ineffective assistance of counsel, intensive scrutiny and second-guessing are not permitted. Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994). Finally, even if the Petitioner were able to satisfy the first prong and establish ineffectiveness, the allegations of ineffectiveness, even when weighed together, do no consist of circumstances that would have changed the outcome of the proceedings. Accordingly, Judge Lynch

correctly concluded that this claim is without merit.

Ground IV: Batson Claim

Finally, the Petitioner claims that his jury was unconstitutionally selected and empaneled in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Specifically, he claims that the trial court permitted the prosecution to use peremptory challenges in a discriminatory manner. The record reveals that the trial judge adequately ruled on Petitioner's objections, and found that the challenged strikes were based upon race-neutral considerations. The trial judge was in a better position to determine the prosecutions' credibility regarding its race-neutral reasons for using its peremptory strikes and this court should accord "great deference to the trial judge's decision regarding a Batson motion." Palmer v. Lares, 42 F.3d 975, 979 (5th Cir. 1995). In the present case, there is no basis for a finding that the trial judge's Batson's rulings were clearly erroneous or even an abuse of discretion. Accordingly, Judge Lynch correctly determined that this ground is without merit.

In view of all of the foregoing, it is

ORDERED and ADJUDGED that Magistrate Judge Lynch's Report and Recommendation is REJECTED IN PART AND ADOPTED IN PART. To the extent that it urges dismissal of Petitioner's Habeas Petition on the merits, it is adopted in its entirety. The present Petition for Habeas Corpus relief is DENIED and this case shall be dismissed with prejudice.

DONE and ORDERED at West Palm Beach, Florida, this 16th day of July, 1997.

JAMES C. PAINE
UNITED STATES DISTRICT JUDGE

c:
counsel of record

FILED by _____ D.C.
AUG 20 1997
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. - W.P.B.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-14227-CIV-PAINE

MICHAEL FRANKLIN GREEN

Petitioner,

vs.

HARRY K. SINGLETARY, JR.

Respondent,

_____/

ORDER DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. §2253

Petitioner's Motion for Issuance of Certificate of Appealability requires this court to determine whether Petitioner should be granted a Certificate of Appealability. Pursuant to 28 U.S.C. §2253(c)(2), a Certificate of Appealability may only issue in a proceeding if the applicant has made a substantial showing of the denial of a constitutional right. In the present case, in light of the holding of the Magistrate in the Report and Recommendation, it simply cannot be said on this record that the Petitioner has made a "substantial

showing of the denial of a constitutional right" for purposes of appeal under §2253. Accordingly, it is

ORDERED and ADJUDGED that the Petition for Certificate of Appealability be DENIED.

DONE and ORDERED this 13th day of August, 1997.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

c: 11th Circuit Court of Appeals
Robert Augustus Harper, Esq.
Joseph A. Tringali, Esq.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 07 1998
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-5414

MICHAEL FRANKLIN GREEN,
Petitioner-Appellant,

versus

DEPARTMENT OF CORRECTIONS, Secretary,
Department of Corrections, State of Florida,
Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED.

/s/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE